



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

JAN 12 2012

REPLY TO THE ATTENTION OF
WU-16J

Michelle Halley, Esq.
National Wildlife Federation
P.O. Box 914
Marquette, Michigan 49855

Dear Ms. Halley:

Thank you for your September 7, 2011 letter requesting that the U.S. Environmental Protection Agency take particular actions regarding Rio Tinto's Eagle Mine and Humboldt Mill in the Upper Peninsula of Michigan. Please find responses to your inquiry in the enclosed document.

If you have further questions, please contact Dr. Stephen Roy in the Water Division at (312) 886-6556 or roy.stephen@epa.gov.

Sincerely,

A handwritten signature in blue ink that reads "Tinka G. Hyde".

Tinka G. Hyde
Director, Water Division

Enclosure

Enclosure

1. Exercise Clean Water Act (CWA) oversight authority in two ways: a) require a National Pollutant Discharge Elimination System (NPDES) permit for the Groundwater/Surface water Interface where mine discharge water flows directly into the East Branch of the Salmon Trout River and b) require a NPDES permit for the over-topping of unmonitored holding ponds into the East Branch of the Salmon Trout River.

EPA investigated the potential applicability of the CWA's NPDES program to the process wastewater to be generated by Kennecott. The company plans to discharge the treated wastewater into the ground water through the Treated Water Infiltration System (TWIS). The ground water eventually emerges as seeps which serve as headwaters to the East Branch of the Salmon Trout River. A NPDES permit is needed to discharge to ground water only where there is a direct hydrologic connection between the ground water and waters of the United States. The Michigan Department of Environmental Quality (MDEQ) determined that there is no immediate connection between the water discharged underground at the site and local surface water. Therefore, MDEQ did not require the company to apply for a surface water discharge permit. EPA evaluated this decision and concurred. We also note that the concentration limits in the State of Michigan Groundwater Discharge Permit for the TWIS are specifically designed to meet surface water quality standards at these seeps.

Regarding the over-topping of mine water holding ponds issue, under the terms of the State's Part 632 mine permit, overflow water from the holding ponds is not allowed to drain into a water of the U.S. Any such discharge without a NPDES permit would be a violation of Section 301 of the CWA and would require an application for a NPDES permit. Under Section 309 of the CWA, EPA has authority to seek appropriate penalties and injunctive relief for any such unpermitted discharge.

2. Require that an environmental impact statement (EIS) be performed that includes, particularly: a) a cumulative impacts analysis including transportation (the state has not assessed impacts from transportation) and b) a Health Impacts Assessment (HIA) (recommended by the International Council on Mining and Minerals of which Rio Tinto is a flagship member; no HIA has been conducted for this project).

An EIS can only be required under the National Environmental Policy Act (NEPA) under certain circumstances. Under NEPA, federal agencies prepare an EIS only when there is a federal undertaking. Since there is no federal undertaking in the instant case, EPA has no authority to conduct or require an EIS. There are also no provisions in Part 632 of the Michigan Natural Resources and Environmental Protection Act to require an EIS. However, Part 632 does require the applicant to complete a very detailed and thorough Environmental Impact Assessment (EIA). Michigan required Kennecott to complete an EIA as part of its Mine Permit Application. There is no statutory authority for EPA to require a HIA.

3. Reinstatement of the Safe Drinking Water/Underground Injection Control (UIC) permit requirement. Rio Tinto's changes to the TWIS did not change the quality or quantity of the discharge, or its threat to drinking water.

As you know, the company withdrew its UIC permit application for the original design of the TWIS on March 24, 2010. EPA carefully evaluated the information Kennecott provided and on July 1, 2010, EPA notified the company that a UIC permit was not required for the re-designed TWIS. The letter explained that the lateral perforated piping that constitutes the fluid distribution system is above ground and is thus not a subsurface system. (The full text of this letter is available on our website, <http://www.epa.gov/r5water/uic/kennecott>.) Although the new system is not regulated by EPA, Kennecott has told the agency that it is considering additional monitoring to address some of the concerns that have been raised. EPA has informed Kennecott that any activity which endangers an underground source of drinking water could be subject to enforcement action under Safe Drinking Water Act (SDWA).

4. Honor the federal government's trust responsibilities to protect treaty resources, and coordinate efforts with the Environmental Justice office to ensure that Eagle Rock and the tribal spiritual uses of it are protected.

In keeping with the Agency's trust responsibilities, EPA policy requires that we consult with tribes when EPA's actions or decisions may affect tribal interests. We are committed to considering the impact of our decisions on the rights of tribes. EPA has been in consultation with the Keweenaw Bay Indian Community (KBIC) throughout its review of the project. EPA has also been involved in both formal and informal consultation and communications with area tribes regarding various aspects of the project for years. Trust responsibilities do not provide agencies any additional authority.

Even though the traditional cultural property identified as Eagle Rock has been surrounded by a fence, we understand that the company has agreed to allow tribal members to visit. Although we have no regulatory authority to require protection of Eagle Rock under the National Historic Preservation Act, we have been encouraging a dialog between the KBIC and Kennecott to protect the cultural property.

We understand that your group has met with regional and national Environmental Justice program representatives about your environmental and health effect concerns regarding the mine project. Although there is no federal permit, EPA follows the activities at this site. We will continue to work to ensure that any outreach and opportunities for involvement regarding any EPA decisions in the project will be directed to all people, particularly tribal and low-income persons in the area.

5. Request key information from the State of Michigan and Rio Tinto.

Finally, you raise the issue that there is essential baseline information that the state and the company have not made available to the public. Kennecott prepared hydrologic studies for the project. They were reviewed by the state, by EPA and by EPA's independent consultants. EPA required Kennecott to submit additional information on this topic, which Kennecott did. Based

on our evaluation of our consultant's review, we concluded that this information was adequate at the time for EPA to be able to complete its review. Ultimately, EPA determined that the TWIS redesign was not subject to SDWA UIC permitting requirements. However, EPA continues to regulate and monitor this project and will continue to ensure that the project meets SDWA requirements. If EPA determines that it is necessary to obtain additional information, it will utilize its information gathering authority.

The Mine Safety and Health Administration does have some jurisdiction over some aspects of the mine operation that you raise. We understand that they have already been on-site for an inspection and are currently scheduled for a minimum of four inspections a year. Any issues related to mine safety concerns can be addressed to Mr. Steven Richetta at (218) 720-5448 or Richetta.Steven@dol.gov.

